In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 585

THE LOUISVILLE & NASHVILLE R. R. ET AL.,
APPELLANTS,

versus

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS

To Ed. Baxter and Joseph W. Barnwell, solicitors for appellants.

Please take notice that on behalf of Henry W. Behlmer, appellee, I will, on Monday, the 14th day of March, 1898, at 12 o'clock M., or as soon thereafter as counsel can be heard, on the transcript of record herein and also on the certified transcript of a part thereof hereto annexed and marked "Exhibit A," make the following motion to the Supreme Court of the United States:

And now comes Henry W. Behlmer, appellee, in above cause, by Claudian B. Northrop, his solictor, and moves the court to vacate the supersedeas in the above cause, or for an order declaring that the appeal bond filed by appellants in said cause does not operate as a supersedeas, on the ground that the section 16 of the Act to Regulate Commerce forbids the security required on appeal to the Supreme Court to operate as a supersedeas in cases arising under that act.

Respectfully,

CLAUDIAN B. NORTHROP,
Solicitor for Henry W. Behlmer, Appellee.

EXHIBIT A.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant, *vs.* The Louivsille & Nashville Railroad Company et al., Appellees.	Appeal from the Circuit Court of the United States for the District of South Carolina.

[Argued May 28, 1896. Decided November 3, 1897.]

Heard by GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

C. B. NORTHROP, Counsel for Appellant; ED. BAXTER, W. A. HENDERSON, J. W. BARNWELL, J. B. CUMMING, J. E. BURKE, Counsel for Appellees.

GOFF, Circuit Judge:

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellees to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennesse, to Summerville, in the State of South Carolina, than that contemporaneously

charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore filed before such Commission, by the appellant, Henry W. Behlmer. In this complaint so filed he alleged, in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots, from Memphis to Summerville; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina Railway, in the State of Carolina, and twenty-two miles inland from the city of Charleston; and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, and that such greater charge constituted a violation of the long and short haul clause of the Interstate Commerce Act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina Railway, for carrying hay from Charleston back to Summerville; and that the 9 cent local rate which the complainant was forced to pay, in addition to the through Charleston rate, in order to get hay transported from Memphis to Summerville, was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville, and was thus 22 miles miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis & Charleston R. R,, thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia & Georgia R. R., thence to Augusta, Georgia, 171 miles, over the lines of the Georgia, R. R., thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management, for continuous carriage or shipment, or were

engaged in the transportation of passengers and property wholly by railroad, between the points mentioned. Also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was twenty-two miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance, was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay $56.00 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of twenty-two miles, for a less sum, to-wit: $38.00 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for twenty-two miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and, therefore, in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings, were members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town, and to the business of its merchants. The petitioner prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the Commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Co. and of the Memphis & Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took place

as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the Interstate Commerce Act, the answers make the following averments, in substance: that the Georgia R. R., Co., and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line," in the sense of said section, from Memphis to Summerville, on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the South Carolina Railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable; and that at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the north Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that the rates on western produce to Charleston and other coast cities are made with a view to actual existing water competition; that western produce, such as grain and hay,

can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia or Baltimore, over continuous water routes by the lakes and canal, or over combined rail and water routes; that the all-rail lines, seeking to do business between Chicago, Charleston and the coast cities, are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo-St. Louis and Memphis, the present all-rail rates on hay per 100 pounds being as follows: from Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controling element in the said competition is the lake, canal and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers—the testimony having been duly taken—the same was, after argument by counsel, duly submitted to the Commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the Interstate Commerce law to do, in the Circuit Court of the United States for the District of South Carolina, in which the action had before the Commission was fully set out, and the refusal of the defendants therein to comply with what he charged to be the lawful order of the Commission was alleged, and

the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants and attorneys, from continuing in their violation and disobedience to said order of the Interstate Commerce Commission; and that finally, an order and decree be issued restraining the said defendants, and each of them, and their officers, servants and attorneys, from further violating or disobeying the requirements of said order of the Commission, and decreeing permanent obediance to the same, together with such further and additional orders as are usually entered under such circumstances.

The court below, on the 2nd day of November, 1894, directed that the defendants appear and answer said petition, and show cause, if any they could, why the prayer of the same should not be granted. In the same order, it was provided that the defendants be restrained and enjoined, until the further order of the court, from charging, collecting or receiving any greater compensation on the aggregate for the transportation of hay, or other commodities, carried by them under circumstances and conditions similar to those in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis to Charleston, and also the South Carolina & Georgia R. R. Co., was restrained and enjoined from imposing, charging and collecting the added local of 9 cents in addition to the through rate of 19 cents to Charleston.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22nd day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed.

At the time of the institution of the proceedings before the Interstate Commerce Commission the South Carolina Railway Co. was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The proceedings were instituted in December, 1892, and the order of the Commission issued on the 27th day of June, 1894, but prior thereto, on April 12, 1894, the South Carolina

Railway Co. was sold by virtue of a decree of the Circuit Court of the United States for the District of South Carolina, entered in the cause of *Bound* vs. *South Carolina Railway Co. et al.*, in which said cause the said Daniel H. Chamberlain had been appointed such receiver. On the 12th day of May, 1894, the purchaser of said property under said foreclosure sale conveyed the same to the South Carolina & Georgia R. R. Co., a defendant herein. That company moved the court below to dismiss these proceedings, so far as it was concerned, for the reason that there was no evidence before the court of any notice to, or service of the same upon said company, of the institution of this action before the Interstate Commerce Commission, nor any evidence of any refusal or neglect by it to obey the order of the Commission. The court below was of opinion that there was no evidence of the service of the Commission's order on the South Carolina & Georgia Railway Co., nor of its refusal or neglect to obey the same, but as there were other defendants as to whom it was necessary to dispose of the questions raised, the court proceeded to a decree concerning the same.

The petition filed in the court below avers that the findings and conclusions of the Commission in the matter of the petition filed before it by the appellant, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their receivers and successors in operation. We think the evidence sufficiently sustains these allegations. The South Carolina Railway Co. had due notice of the proceedings before the Commission, and filed its answer through its receiver, and it plainly appears that a registered letter was sent from the office of the secretary of the Commission in July, 1894, and duly delivered at Charleston to the successor of said South Carolina Railway Co.—the South Carolina & Georgia R. R. Co.—which contained a copy of the opinion and order of the Interstate Commerce Commission made and filed in the matter of said petition. That such copy was received by the South Carolina & Georgia R. R. Co. is not doubted, and the point relied upon by that company in its motion to dismiss made in the court below was that the name of the South Carolina & Georgia R. R. Co. is not mentioned in said order and opinion, and the further fact that said company was organized after the date when such order and opinion were made and filed. In our judgment

this position of the South Carolina & Georgia R. R. Co. is without merit. So far as the questions involved in this controversy are concerned, we think it had sufficient notice, and in fact that it was bound by the notice served upon and the answer filed by the receiver of the South Carolina Railway Co. The petitioner in his complaint filed with the Commission charged the South Carolina Railway Co. and its receiver with unlawfully charging an unreasonable rate of freight on certain articles transported over its line and other lines with which it had traffic arrangements, and the Commission, after full investigation, found that the petitioner's allegation was true, and ordered that said road and the others connected with it cease, on or before July 15, 1894, to make such unlawful charges. We are utterly unable to agree with the contention that such order of the Commission was rendered absolutely nugatory, within a few days after it was issued, by the mere fact that the name of one of the railroads mentioned therein had in the meantime been changed, while the traffic arrangements theretofore in existence were still in force. To so hold would render it impossible for any petitioner to obtain relief in cases similar to this, and would in fact prevent the Commission from enforcing its lawful orders. The Supreme Court of the United States in the case of *United States* vs. *Trans-Missouri Freight Association*, 166 U. S., 290, 309, in effect decides this point in the manner we have indicated when it says in substance that if by the mere dissolution of the association originally proceeded against the suit abates, that then defendants have thereby discovered an effectual means to prevent the judgment of the court being given on the question really involved in the case.

We do not think it essential to the decision of this case to further consider the argument of counsel relating to the pecuniary liability of the purchaser or property sold under foreclosure decree, nor of the responsibility of such purchaser for contracts made by the receiver prior to such sale, as, in our judgment, the propositions of law therein involved are not applicable to the facts and circumstances of this case. We conclude that the court below had jurisdiction of the parties and of the subject matter involved, and such being the case, it was its duty as a court of equity to make both its jurisdiction and

its remedy effectual for perfect relief, if it found the allegations of the petition to be true.

This brings us to the real question in this case, and that is have these defendants violated the provisions of the fourth section of the act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce." (24 Statutes at Large, 379.) That section reads as follows: "Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distance for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

We find this case, so far as the fourth section is involved, to be quite similar to the case of *Cin., N. O. & Tex. Pac. Railway* v. *Int. Com. Com.*, 162 U. S., 184, commonly known as "*The Social Circle Case.*"

That the appellees, in transporting the hay and other property mentioned in the petition filed in this cause, and in establishing the rates on the same from Memphis to Charlestion, and from Memphis to Summerville, were engaged in such transportation under a common management for continuous carriage or shipment, within the meaning of that language as used in the Act to Regulate Commerce, is, we think, without doubt, and therefore it follows that it was within the jurisdiction of the Interstate Commerce Commission to ascertain whether, in charging a higher rate for a shorter than for a longer distance over the same line in the same direction—the shorter being included within the longer distance—the appellees were transporting such property under substantially similar circumsan-

stances and conditions. The appellees alleged, both before the Commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were in fact substantially dissimilar. The Commission, in ascertaining the facts, found against this claim of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant. The Circuit Court, however, on hearing the matters involved, sustained the claim of the appellees and refused to enforce the order of the Commission.

The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville, is created by: 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston.

The decisions of the Interstate Commerce Commission, concerning the proper construction of this fourth section of the Commerce act, have not been uniformally sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the Commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle case* there was much confusion confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission, in a number of cases decided by it prior to such decision, is the proper one. In this connection may be cited the following: *The James & Mayer Buggy Co.* v. *The Cin., N. O. & Tex. Pac. R. Co. et al.*, 3 Inters. Com. Rep., 682; *Ga. R. R. Co.* v. *Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; *Chattanooga Board of Trade* v. *East Tenn., V. & G. R. Co.*, 4 Inters. Com. Rep., 213. Such being our conclusions, we have now to determine whether or not the facts found by the Commission are supported by the evidence taken in this case, or, in other

words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Charleston, and from Memphis to Summerville, are so dissimilar as to justify the rates charged, respectively. Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the Act to Regulate Commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the Commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul. We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not. Such we believe to be the true meaning of said fourth section, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold

that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which the transportation is performed, as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the Commission, granted by it as provided for in the proviso to the fourth section.

It is fair to presume that if the facts in any given case justify departure from this rule, the Commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier, as well as the shipper, demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets, or of carrying lines, subject to the provisions of the Commerce act, justify carriers in making greater short haul and lower long haul charges, over the same line, without an order from the Commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected, and schedules shall be made, announced and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals or corporations, and to put all shippers on the same footing—that of perfect equality.

The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative, it is fair to presume that it would not have been made by the railroads, unless those controlling them were satisfied that it would be so, and, consequently, to justify the higher charge for the shorter haul to Summerville, which, we have found was made under substantially similar circumstances and conditions, the Commission, after application to it for that purpose, must find certain reasons for the same, after due investigation, that may in fact exist, but which, we are

compelled to say, are not now disclosed by the record before us. In the light of the act to regulate commerce, and keeping in view the theory upon which it was constructed, it is not difficult to understand why application was not made to the Commission for permission to charge less for the longer haul to Charleston than for the shorter haul to Summerville, when the rate proposed was 19 cents per 100 pounds for the longer and 28 cents per 100 pounds for the shorter.

The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? In order to build up one locality, we should not tear down many others; and justice to one section should not be purchased at the expense of another.

It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed—that it shall be made less and, consequently, unremunerative, or increased, and thereby cause the loss of the traffic—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston.

Finding the facts to be as above indicated—substantially as found by the Interstate Commerce Commission in the proceedings instituted before it by the appellant—and construing the laws as we do, it follows that the order issued by said Commission to the appellees was a lawful order, of which they had due notice, and which it was and is their duty to obey and respect.

We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville.

The decree of the court below dismissing the bill is reversed, and this cause is remanded to said court with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, col-

lecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Said court will also see that the requirements of said decree are immediately carried into effect, and enforced, as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of his proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

Reversed and Remanded.

MORRIS, District Judge:

I am unable to join in the order reversing the decree of the Circuit Court, which it is proposed to pass in this case, and will very briefly state my reasons:

Behlmer, in his petition to the Commission, complained that he was charged as freight on two car-loads of hay from Memphis to Summerville at a rate of twenty-eight cents per hundred, while the rate over the same roads to Charleston, twenty-two miles farther, was only nineteen cents. This, he alleged, was a violation of the fourth section of the Interstate Commerce Act. He further complained that the nine cents additional per hundred charged to Summerville was based on the local rate for twenty-two miles from Charleston back to Summerville over the South Carolina Railroad, which itself, he alleged, was excessive and unreasonable, and he further alleged that the combined rate of twenty-eight cents from Memphis to Charleston was excessive and unreasonable and in violation of the first section of the act.

The defendants answered, alleging that there were eight all-rail routes which were competitors for the business from Memphis to Charleston; that there was besides existing water competition from ports on the Atlantic coast to Charleston; and that the rate from Memphis to Charleston of nineteen cents per hundred was forced upon

the defendant lines by this rail and water competition which they had to meet at Charleston, but which the South Carolina Railroad did not have to meet at Summerville, and that rates which were just and reasonable to Summerville would result in the loss of the business if charged to Charleston.

The Commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point, deemed it unnecessary to consider whether any other provision of the law had been violated.

In the decision of the Commission appears the following:

"There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for the reasons stated in our decisions of the cases above cited, they do not justify carriers in departing from the rule of the fourth section without such relieving order. Water competition to justify lower long-haul rates must exist between the point of shipment and the longer distance destination. One transportation cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone, if the former did not undertake it. The competition of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short haul or lower long haul charges over the same line without an order issued by the Commission on application therefor after investigation."

The decision then quotes the rule of practice of the Commission with reference to the applications under the proviso of the fourth section, and then proceeds:

"Because Charleston is an important seaport and rail

road centre, and hay may be and is carried there from various points, is not a sufficient reason for a departure from this rule. The just interests of the carrier are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition, if the rates obtainable are not remunerative. If they are remunerative, the defendants cannot, in the face of the prohibition of the 4th section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of car load quantities to a shorter point on the same line and in the same direction."

There was no finding of fact by the Commission other than is contained in the foregoing extract from its decision, and it is obvious that the Commission did not pass upon the question of the dissimilarity of the circumstances and conditions, nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that by charging a greater rate for the shorter haul over the same line, the carriers were *prima facie* without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the Commission under the proviso of the 4th section. One of the cases cited by the Commission in support of this proposition of law is the decision of the Circuit Court of Appeals in *Int. Com. Com.* vs. *Cin., N. O. & Tex. Pac. R'y.*, now known as the "*Social Circle Case.*"

The Supreme Court, in reviewing that case (162 U. S., 184-194), did not approve such a hard and fast rule, but held in that case that as the Commission had found as a fact that the circumstances and conditions were not so dissimilar as to justify the rates charged, and as the Circuit Court of Appeals had approved that finding, the Supreme Court would not disturb it. But in the case known as the "*Import Case,*" 162 U. S., 197, the Supreme Court held, in deciding a similar question, that it was error for the Commission not to consider an existing competition which affected rates, and the fact that rates had to be reduced in order to secure freight, which otherwise would go by other routes, was one of the circumstances and conditions which must be considered before substantial similarity could be determined.

It may be fairly said, therefore, that the Commission failed to consider one of the circumstances without which it could not arrive at a just finding. *Tex. Pac. R'way* v. *Int. Com. Com.*, 162 U. S., 197-238; *Int. Com. Com.* v. *The Alabama Midland R'w'y Co.*, Ct. Ct. of Apps., 5th Circuit; *Int. Com. Com.* v. *L. N. R. R. Co.*, 73 Fed. Rep., 409.

It was error, I think, for the Commission to hold that the carriers could not justify themselves because they had not first made application for relief under the proviso of the 4th section. It has been held that if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute has not been violated (*Int. Com. Com.* v. *A. T. & S. F. R. R. Co.*, 50 Fed. Rep., 295), and this seems a reasonable construction of the law.

The case, therefore, it appears to me, came into the Circuit Court without any finding of the fact upon which an order against the carriers could be predicated. The Circuit Judge examined the testimony and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade center, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina and Georgia Railroad, was not subject to having its local rates forced down by competition below what was reasonable and just.

Upon consideration of all the proven facts, the Circuit Judge found that the circumstances and conditions were not substantially similar, and that the defendant carriers had not violated the act.

With this conclusion I agree. There is abundant proof to support it, and also to show the great loss which would result to the South Carolina & Georgia Railroad (the successor of the South Carolina Railroad), if it was required to conform its local rates to its share of the through rates.

DECREE.

UNITED STATES CIRCUIT COURT OF APPEALS.

FURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,
vs.
Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee, as Receivers of said last two mentioned Roads; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company; The South Carolina Railway Company and its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the purchaser, assignee and successor of the same, Appellees.

} Appeal from the Circuit Court of the United States for the District of South Carolina.

This cause came on be to heard on the transcript of the Record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with cost; and this cause is remanded to the said Circuit Court of the United States for the District of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under

circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis, aforesaid, to Charleston, in the State of South Carolina. That said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof.

NATHAN GOFF.

November 6, 1897.

PETITION FOR REHEARING.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant, *vs.* The Louisville & Nashville Railroad Company, et al., Appellees.	Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston, S. C.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Fourth Circuit:

Your petitioners, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the pur-

chaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, respectfully show to your Honors that this cause came on to be heard in this Honorable court on the Transcript of the Record from the Circuit Court of the United States for the District of South Carolina; and on consideration whereof it was, on the sixth day of November, 1897, ordered, adjudged and decreed by this court as follows, viz.:

"That the decree of the said Circuit Court, in this cause be, and the same is hereby reversed, with costs, and this cause is remanded to the said Circuit Court of the United States for the District of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. The said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

"It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof."

No mandate has yet been issued.

Your petitioners are advised and humbly submit that said order and decree of this court of November 6th, 1897, is erroneous, and the same ought to be reversed; and your petitioners respectfully state the following grounds, viz.:

1. It is respectfully submitted that this court erred in reversing said decree of said Circuit Court in this cause.

2. It is respectfully submitted that this court erred in remanding this cause to said Circuit Court.

3. It is respectfully submitted that this court erred in instructing said Circuit Court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

4. It is respectfully submitted that this court erred in not affirming the decree of said Circuit Court, which was reversed by this court.

5. It is respectfully submitted that this court erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in said Circuit Court, in this cause, are fully denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

6. It is respectfully submitted that this court erred, because it, in effect, decided that the rates charged by petitioners for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, are unjust and unreasonable.

7. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation of hay or other commodities carried by petitioners from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, is a like and contemporaneous service rendered under substantially similar circumstances and conditions, with the transportation of hay or other commodities carried by petitioners from Memphis, Tennessee, to Charleston, S. C.

8. It is respectfully submitted that this court erred, because it, in effect, decided that as petitioners make a greater charge in the aggregate on hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight carried by them from Memphis, Tennessee, to Charleston, S. C, they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

9. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, as compared with the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

10. It is respectfully submitted that this court erred, because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation from Memphis, Tennessee, to Summerville, South Carolina, to be charged by petitioners as common carriers subject to the Act to Regulate Commerce.

Petitioners submit herewith a duly certified copy of the opinion of the Supreme Court of the United States in the case of the Interstate Commerce Commission, Appellant, *vs.* The Alabama Midland Railway Company et al., Appellees, No. 203, October term, 1897, of said court; which opinion was delivered by said court on November

8th, 1897, five days after the opinion in this case was delivered by this court.

Wherefore petitioners respectfully pray that this cause may be reheard before this court; that the issuance of the mandate in this case be suspended until this application can be heard, and that the said order and decree rendered by this court in this cause on November 6th, 1897, may be reversed, and that said decree of the Circuit Court of the United States for the District of South Carolina, rendered in this cause, be affirmed, with costs, and that such other orders and decrees may be made as to your honors may seem meet and the circumstances of the case may require. As in duty bound your petitioners will ever pray, etc.

ED. BAXTER,
Solicitor for Petitioners.

I, Ed. Baxter, an attorney and solicitor, practicing in United States Circuit Court of Appeals, Fourth Circuit, do certify that in my opinion the grounds stated in the above petition for a re-hearing are well founded in law and fact, and that this cause is proper to be reheard before your Honors, if your Honors shall think fit.

ED. BAXTER,
Attorney and Solicitor.

ORDER REFUSING REHEARING.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant, *vs.* Louisville and Nashville Railroad Company, et al., Appellees.	Appeal from the Circuit Court of the United States for the District of South Carolina.

This cause having been decided at this term in favor of the appellant, and the appellees, by Ed. Baxter, attorney, having presented to the court on the 10th day of November, 1897, a petition for a rehearing of the cause.

It is now here ordered and adjudged by this court,

that the rehearing asked for be, and the same is hereby, refused.

It is further ordered that the mandate of this court to the court below be withheld until the 20th day of January, 1898.

NATHAN GOFF.

November 24, 1897.

PETITION FOR APPEAL.

IN UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,
vs.
The Louisville & Nashville Railroad Company, et al.,
Appellees.

Said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of the two last mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, conceiving themselves aggrieved by the decree entered in this cause in said United States Circuit Court of Appeals, on the sixth day of November, 1897, do hereby appeal from said decision to the Supreme Court of the United States, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers,

upon which said decree was made, fully authenticated, may be sent to the Supreme Court of the United States.

JOS. W. BARNWELL,
Solicitor for S. C. & Ga. R. R.
ED. BAXTER,
Solicitor for Appellees, as of record.

January 17, 1898.

ASSIGNMENT OF ERRORS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,
vs.
The Louisville & Nashville Railroad Company et al., Appellees.

On the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight, came the said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of the last two mentioned roads; and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virgina and Georgia Railway Company, and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said Circuit Court of Appeals in the above-entitled cause, on the sixth day of November, 1897, and in the record and proceedings in said cause in said court, there is manifest error in this, to-wit:

I.

That said Circuit Court of Appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22nd, 1896, by the Circuit Court of the United States for the District of South Carolina.

II.

That said Circuit Court of Appeals erred in instructing said Circuit Court to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate, for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis, aforesaid, to Charlestion, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

III.

That said Circuit Court of Appeals erred in decreeing that said appellees should pay the costs of said cause in said Circuit Court of Appeals.

IV.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause January 22nd, 1896, by said Circuit Court of the United States for the District of South Carolina.

V.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in the above-entitled cause, are fully

denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

VI.

That said Circuit Court of Appeals erred because it in effect, decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., are unjust and unreasonable.

VII.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Summerville, S. C., is a like and contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, S. C.

VIII.

That said Circuit Court of Appeals erred because it, in effect, decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

X.

That said Circuit Court of Appeals erred because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennesssee, to Summerville, S. C.

XI.

That the said Circuit Court of Appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the Interstate Commerce Act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said Circuit Court of Appeals erred in not sustaining the decree of the Circuit Court dismissing the petition of appellant as against the South Carolina & Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville, than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That the said Circuit Court of Appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, the South Carolina & Georgia Railroad Company; and in not deciding that it was beyond the power of the Circuit Court, after dismissing the petition of appellant, to alter, correct or amend said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said Circuit Court of Appeals erred in reversing the decree of the Circuit Court which found that the appellee, the South Carolina & Georgia Railroad Company, was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railroad Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders, and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore, the above named appellees, the Louisville and Nashville Railroad Company, the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, pray that the said decree of said United States Circuit Court of Appeals for the Fourth Circuit, rendered November 6th, 1897, be reversed, and that said court be ordered to enter a decree affirming the said decree rendered on the said 22nd day of January, 1896, in the above entitled cause by the said Circuit Court of the United States for the District of South Carolina.

ED. BAXTER,
Solicitor for said appellees as of record,
JOS. W. BARNWELL,
Solicitor for the South Carolina & Georgia
Railroad Company.

APPEAL BOND.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 173.

Henry W. Behlmer, Appellant,
vs.
The Louisville & Nashville Railroad Company, et al.,
Appellees.

Know all men by these presents, that we, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis and Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, as principals, and Ed. Baster, as surety, are held and firmly bound unto the above named Henry W. Behlmer in the sum of two thousand dollars, to be paid to the said Henry W. Behlmer, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of January, in the year of our Lord, eighteen hundred and ninety-eight.

Whereas the above-named, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charlescon Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company,

the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company, the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States Circuit Court of Appeals for the Fourth Circuit, on the sixth day of November, 1897.

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company, the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY. [Seal.]

By ED. BAXTER,
Its Solictor and Attorney in Fact.

THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA. [Seal.]

By ED. BAXTER,
Its Solictor and Attorney in Fact.

H. M. COMER, Receiver. [Seal.]

By ED. BAXTER,
His Solicitor and Attorney in Fact.

THE MEMPHIS & CHARLESTON RAILROAD COMPANY. [Seal.]
By ED. BAXTER,
Its Solicitor and Attorney in Fact.

THE EAST TENESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY. [Seal.]
By ED. BAXTER,
Its Solicitor and Attorney in Fact.

SAMUEL SPENCER, Receiver. [Seal.]
By ED. BAXTER,
His Solictor and Attorney in Fact.

HENRY FINK, Receiver. [Seal.]
By ED. BAXTER,
His Solictor and Attorney in Fact.

CHAS. M. McGHEE, Receiver. [Seal.]
By ED. BAXTER,
His Solicitor and Attorney in Fact.

THE SOUTHERN RAILWAY COMPANY. [Seal.]
By ED. BAXTER,
Its Solicitor and Attorney in Fact.

THE SOUTH CAROLINA RAILWAY COMPANY. [Seal.]
By ED. BAXTER,
Its Solicitor and Attorney in Fact.

DANIEL H. CHAMBERLAIN, Receiver. [Seal.]
By ED. BAXTER,
His Solictor and Attorney in Fact.

THE SOUTH CAROLINA & GEORGIA RAIROAD COMPANY. [Seal.]
By JOS. W. BARNWELL,
Its Solicitor and Attorney in Fact.

ED. BAXTER, Surety. [Seal.]

..... [Seal.]

Sealed and delivered and taken and acknowledged before me and approved by me, this 17th day of January, eighteen hundred and ninety-eight.

NATHAN GOFF, Judge.

ORDER GRANTING APPEAL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,
vs.
The Louisville & Nashville Railroad Company et al., Appellees.

Said appellees, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last twe mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company, and its receiver, Daniel H Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, pray an appeal from the decree rendered by this court in the above-entitled cause, on November sixth, 1897, to the Supreme Court of the United States; and said appellees, having filed with the clerk of this court their petition for appeal, together with an assignment of errors, and an appeal bond, which bond has been duly approved, it is ordered, adjudged and decreed by the court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

January 17, 1898. NATHAN GOFF.

CITATION ON APPEAL.

UNITED STATES OF AMERICA. } *ss:*

To Henry W. Behlmer—Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States Circuit Court of Appeals for the Fourth Circuit, in the case of Henry W. Behlmer, appellant, *vs.* The Louisville & Nashville Railroad Company, The Central Railroad & Banking Conpany of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia Railroad; The Memphis & Charleston Railroad Company; The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Chas. M. McGhee, as receivers of said last two mentioned roads; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and The South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, as appellees, to show cause, if any there be, why the decree of said Court of Appeals, rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on the behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, Judge.

This citation may be served by the marshal of the district where said Henry W. Behlmer, or his solicitor of record in the above cause, may be found.

NATHAN GOFF, Judge.

Endorsed:

Service of a copy of the above citation is hereby acknowledged this 20th day of January, 1898.

CLAUDIAN B. NORTHROP,
Solicitor for said Henry W. Behlmer.

Personally comes James S. Simons, Chief Office Deputy Marshal, who being duly sworn deposes and says that he served a copy of the within citation on Henry W. Behlmer (personally) at Summerville, So. Ca., on 20 January, 1898.

J. S. SIMONS,
Chf. Office Deputy U. S. Marshal.

Sworn to before me Jany. 25, 1898.

{Seal of Court.}

J. E. HAGOOD,
C. C. C. U. S.

CLERK'S CERTIFICATE.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing are true copies of the original opinion, decree, petition for rehearing and order thereon, petition for appeal, assignment of errors, bond and order granting appeal, citation, &c., filed and now remaining among the records and proceedings of said court in the therein entitled cause.

{Seal of the Court.}

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 26th day of January, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 173.

Henry W. Behlmer, Appellant,
vs.
Louisville and Nashville Railroad Company and other railroads, Appellees.

Appeal from the Circuit Court of the United States for the Dist. of South Carolina.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

The mandate of this court, in this case, having been stayed by the order of the court pending the preparation of the papers and proceedings on the appeal of the appellees to the Supreme Court of the United States, and the proceedings on the said appeal having been perfected, and the order granting the said appeal having been entered, I have declined to issue the mandate of this court to the court below, in this cause, without the further order of this court.

Teste:

(Seal of the Court.)

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth District.

January 22, 1898.

U. S. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, CLERK'S OFFICE.

HENRY T. MELONEY,
CLERK.

Richmond, Va., Feb. 1, 1898.

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the November term, 1897, of the said court finally ad-

journed on this first day of February, 1898, at twelve o'clock M, as shown by the records of the said court.

Seal of the Court.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 1st day of February, A. D. 1898.

HENRY T. MELONEY,
Clerk of said Circuit Court of Appeals.

BRIEF OF APPELLEE

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 585

THE LOUISVILLE & NASHVILLE R. R. ET AL.,
APPELLANTS,

versus

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

CLAUDIAN B. NORTHROP, SOLICITOR FOR APPELLEE.

The matter now before this court grows out of a proceeding, under the 16th section of the Act to Regulate Commerce. (U. S., Stat. at Large, Vol. 24, p. 379, amended U. S., Stat. at Large, Vol. 25, p. 855.) A petition was filed in the U. S. Circuit Court, Fourth Circuit, to enforce

the order of the Interstate Commerce Commission. That court dismissed the bill, and on appeal to the Circuit Court of Appeals for the Fourth Circuit the court below was reversed, and a decree entered Nov. 6, 1897, commanding the order of the Interstate Commerce Commission to be enforced. A petition for rehearing was filed and refused by the appeal court, and an order entered withholding the mandate until the 20th day of January, 1898. On the 17th day of January, 1898, an appeal was allowed to the Supreme Court and a bond approved, purporting to be a supersedeas bond, and the Clerk of the Circuit Court of Appeals certifies that he has declined to issue the mandate to the court below; the Nov. term 1897, Circuit Court of Appeals closed Feb. 1st 1898. All of which appears in the papers submitted herewith, and marked "Exhibit A."

"A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; * * " *Goddard* v. *Ordway*, 94 U. S., 672.

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hagan* v. *Ross*, 11 How., 297; *R. R. Co.* v. *Harris*, 7 Wall., 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law."

Sage v. *Cent. R. R.* 93 U. S., 417.

It is clear, then, that those who invoke a supersedeas

must point to some statute allowing it, and must show that they have complied with its conditions in every particular.

As previously stated, this matter grows out of a proceeding under the 16th section of the Act to Regulate Commerce.

The provisions of that section, far from allowing a supersedeas, expressly forbid it, in the following language:

"When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal, but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon." * * U. S. Stat. at Large, Vol. 24, p. 379, Vol. 25, p. 855, Sec. 16.

In the case of *I. C. Com.* v. *A. T. & S. F. R. Co.*, 149 U. S., 264, this court decided that since the act of 1891 creating the United States Circuit Courts of Appeals, no appeal would lie direct to this court, and to this extent and in this particular the Commerce Act was modified.

It is well settled that a statute is impliedly repealed by a subsequent statute only so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.

U. S. v. *Henderson*, 11 Wall., 652.

Wood v. *U. S.*, 16 Pet., 342.

Tobin v. *Murphy*, 95 U. S., 191.

Under this rule, the provision of the Commerce Act forbidding a supersedeas in cases arising under it remains of force, there being nothing in the Circuit Court of Appeals Act of 1891 on that point repugnant to or plainly intended as a substitute for it.

The only statutes repealed by the act of 1891 were those inconsistent with sections 5 and 6 thereof. Sec.

14 of that act is as follows: "* * * And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writ of error in the preceding sections five and six of this act are hereby repealed." (U. S. Stat. at Large, Vol. 26, p. 829.) Section 5 of that act enumerates such cases as are directly appealable to this court. Interstate commerce cases are not included in the category, hence this court held that in such cases there was no direct appeal, 149 U. S., 264, but that under section 6 requiring all other cases than those mentioned in section 5, to go to the Court of Appeals they must take that course.

Section 6 of the appeal act 1891, contains a catalogue of the cases directly appealable to the Circuit Court of Appeals and makes the judgment of the latter tribunal final in certain cases such as admiralty and others specially mentioned, with power in this court to bring these up by certiorari, if it thinks proper, or for the Circuit Court of Appeals to certify any questions to this court for instruction. All cases not enumerated as final in section 6 are appealable of right to this court.

It thus appears that sections 5 and 6 of the act of 1891, simply deal with a classification of cases appealable directly to the Supreme Court and the Circuit Courts of Appeals, respectively, and for the review of cases from the latter court. These sections 5 and 6 do not mention at all the subjects of bonds or securities on appeal either to the Supreme Court or to or from the Circuit Court of Appeals. Neither is the subject of citation or other process mentioned or assignment of errors, but these sections are wholly and solely confined to classification and distribution of appellate jurisdiction. Appellate procedure is untouched by them. The repealing clause of the act of 1891 expressly states that it refers only to "acts and parts of acts" inconsistent with "the preceding sections five and six of this act." Sections "five and six" being absolutely silent on the subject of supersedeas, no inconsistency can or does

arise thereon, hence no existing law on that topic was repealed. So the provisions of the commerce act forbidding security on appeal to operate as a supersedeas, not being inconsistent with sections 5 and 6 of the act of 1891, remain of force.

THE ACT OF 1891 EXPRESSLY ADOPTS AND PRESERVES THE PROVISION FORBIDDING A SUPERSEDEAS.

In addition to what has already been said, attention is called to the fact that the act of 1891 expressly preserves "all provisions of law now in force regulating the methods and system of review" * * "including all provisions for bonds or other securities," and commands that they shall apply and be enforced "in respect of the Circuit Courts of Appeals."

Section 11 of the act creating the Circuit Courts of Appeals reads as follows:

Sec. 11: "That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed. Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Court of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act, in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the Circuit Courts of Appeals, in respect of cases, brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by

law belong to the justices or judges in respect of the existing courts of the United States, respectively."—U. S. Stat. at Large, Vol. 26, p. 829.

The important clause of this section to be analyzed is the following:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

It will be observed that the terms of the statute are universal, the provisions to be preserved are "all," not some, and they apply to the new system of appeals created by the act. All the old practice on appeal is retained and governs and controls the new mode. In cases where assignments of error were required under the old practice they are retained under the new. In cases were bonds were necessary under the old law, they are made equally necessary under the new. Where, under the old mode, bonds were not necessary in a certain class of cases, as where the United States or a Department of the Government were the suitors, no bond is required by the new law. In cases where a supersedeas was allowed under the old law, it is still allowed, and the form of the bond is the same as before, in cases where a supersedeas was forbidden, it is still forbidden. In fact, all the old practice is retained, or in the words of the statute itself, "all provisions of law now in force," * * "including all provisions for bonds or other securites," * * "shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of Circuit Courts of Appeals." The old practice and the old provisions are retained and made applicable to Circuit Courts of Appeals *eo nomine*

One of the "methods and systems of appeals and writs of error provided for in this act," is an appeal to the

Supreme Court from the Circuit Courts of Appeals in cases arising under the Commerce Act, 149 U. S., 264. Hence "all provisions of law now in force," * * "including all provisions for bonds or other securities,' "shall regulate," such appeals, "in respect of Circuit Courts of Appeals."

Such are the express requirements of the section, all prevailing provisions governing the old modes of appeal are to regulate the new.

It only remains to inquire what "provisions for bonds or other secuties" were of force at the time of the adoption of the act of 1891. At that time, as we have seen, section 16 of the Act to Regulate Commerce read, and still reads, that an appeal might be taken to the Supreme Court "under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon."

This being the law in force at the time governing cases under the Commerce Act, it was expressly adopted and preserved by the act creating the Circuit Courts of Appeals, and made applicable to the new mode of appeals from those courts to the Supreme Court of the United States.

It is therefore respectfully asked that the motion be granted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.